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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1121

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Petitioner,

vs.

WRITERS GUILD OF AMERICA WEST, INC.,
Respondent.

No. 76-1153

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Petitioner,

vs.

WRITERS GUILD OF AMERICA WEST, INC.,
Respondent.

No. 76-1162

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WRITERS GUILD OF AMERICA WEST, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

HARRY J. KEATON,
Attorney for Petitioner, Association of Motion Picture and Television Producers, Inc.

Of Counsel:
MITCHELL, SILBERBERG & KNUPP,
ANDREW B. KAPLAN,
1800 Century Park East,
Los Angeles, Calif. 90067,
(213) 553-5000,

July 22, 1977.

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SUBJECT INDEX

I. Page

Opinions Below 2

II.

Jurisdiction 2

III.

Statutes Involved 2

IV.

Question Presented 4

V.

Statement of the Case 4

A. Statement of Facts 4

B. Statement of Proceedings Below 8

VI.

Summary of Argument 9

VII.

Argument 12

A. The Union Violated Section 8(b)(1)(B) by Threatening, Fining and Otherwise Disciplining Supervisory and Executive Members of the Union Who Crossed Picket Lines to Perform their Normal Supervisory and Management Representative Functions 12

1. The Court Below Incorrectly Construed this Court's Decision in Florida Power as Permitting a Union to Discipline Supervisory Members, Who Are Management Representatives, and Who

Page

Cross the Union's Picket Line but Perform No Rank and File Struck Work .. 12

c. Florida Power Was Tried, Briefed, Argued and Considered by the Board, the Court of Appeals and this Court as Raising the Limited Issue of whether, during a Strike a Union May Impose Discipline on Supervisory Members Who Perform Rank and File Struck Work without Violating Section 8(b)(1)(B) 14

b. Since Florida Power, the Board Has Consistently and Correctly Construed the Court's Holding to Permit Union Discipline of Supervisory Members only where those Members Perform Rank and File Struck Work 17

2. The Union's Discipline of Supervisory and Executive Members Who Worked during the Strike Is Violative of the Plain Meaning of Section 8(b)(1)(B) 20

3. The Court below Should Have Accepted the Board's Application of the "Effect Test" to the Union's Conduct because It Is Consistent with the Standard Established by this Court in Florida Power 25

Page

B. The Factual Issues Raised by the Union in Its Opposition to the Petitions for Certiorari and in the Court Below Were Correctly Decided by the Board 27

1. The Board Correctly Found that the Supervisory and Executive Members of the Union Employed by the Employer Members of the Association Are Management Representatives within the Meaning of Section 8(b)(1)(B) of the Act 28

2. The Board Correctly Found that the Supervisory and Executive Members of the Union Employed by the Employer Members of the Association Performed No Rank and File Struck Work 29

VIII.

Conclusion 31

TABLE OF AUTHORITIES CITED

Cases

Page

Bakery and Confectionary Workers International Union of America, Local Unions 24 and 119 and Food Employers Council, Inc., 216 NLRB 917 (1975) 26

Chicago Typographical Union No. 16 and Hammond Publishers, Inc., 216 NLRB 903 (1975) 11, 17, 25, 26

Florida Power & Light Co. v. International Brotherhood of Electrical Workers Local 641, 417 U.S. 790 (1974) .....9, 10, 12, 13, 15, 16, 17 .....18, 20, 21, 22, 24, 25, 31

Hammond Publishers, Chicago Typographical Union No. 16 v. National Labor Relations Board, ... F.2d ....., Association Pet. App. B., p. 74 (1976) 18, 25

International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company) and Bell Supervisors Protective Association (Not a Labor Organization), 192 NLRB 85 (1971) 14, 15, 20

International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board, 487 F.2d 1143 (1973) 15, 22

International Brotherhood of Electrical Workers System Council U-4 et al. and Florida Power & Light Company, 193 NLRB 30 (1971) 14

Page

International Organization of Masters, Mates and Pilots v. National Labor Relations Board, 486 F.2d 1271 (CADC, 1973) 29

International Union of Operating Engineers, Local No. 9, AFL-CIO (Shelton Pipeline & Construction, Inc.) and Robert Collins, 213 NLRB 679 (1974) 17

Local No. 492, United Brotherhood of Carpenters and Joiners of America and Keystone Conservation Services, Inc., 211 NLRB 62 (1974) 17

Meat and Provision Drivers Union Local 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., and Food Employers Council, 224 NLRB No. 40 (1976) 18

National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111 (1944) 32

New Mexico District Council of Carpenters (A. S. Horner, Inc.), 177 NLRB 500 (1969), enf'd. 454 F.2d 1116 (CA 10, 1972) 11, 22, 23, 24

New York Typographical Union No. 6 International Typographical Union AFL-CIO and Daily Racing Form, a subsidiary of Triangle Publications, Inc., 206 NLRB 294 (1973) 12, 17, 19

New York Typographical Union No. 6 International Typographical Union AFL-CIO and Daily Racing Form, a subsidiary of Triangle Publications, Inc., 216 NLRB 896 (1975) 12, 20, 24, 26, 29

Page

San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.), 172 NLRB 2173 (1968) 20, 21, 28

Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union and Associated Food Stores, Inc., 220 NLRB 809 (1975) 18, 24

Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Skippy Enterprises, Inc., 218 NLRB 1063 (1975) 18, 29

Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. National Labor Relations Board, 532 F.2d 47 (CA 7, 1976) 18

Writers Guild of America, West, Inc. and Association of Motion Picture and Television Producers, Inc., Association Pet. App. A, pp. 6-71 17

Radio Officers Union v. National Labor Relations Board, 347 U.S. 17 (1954) 26, 27

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 27

Statutes: Page

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USC 151, et seq.)

Section 2(3) 2, 19

Section 2(11) 3, 5

Section 8(b)(1)(B) .....3, 4, 5, 8, 9, 10, 11, 12 ....13, 14, 15, 16, 19, 20, 21, 22, 23, 25, 28, 29

Section 10(e) 3

Section 14(a) 19

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 29, Sec. 160(e) 27

Miscellaneous:

Brief for the International Brotherhood of Electrical Workers, AFL-CIO in Florida Power & Light Co. v. International Brotherhood of Electrical Workers Local 641, 417 U.S. 790 (1974) 15

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BRIEF FOR THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

I.
OPINIONS BELOW.

The opinion in the Court of Appeals (Association Pet. App. A, pp. 1-6)[1] is reported at 547 F.2d 159. The decision and order of the National Labor Relations Board (Association Pet. App. A, pp. 6-71) is reported at 217 NLRB 957.

II.
JURISDICTION.

The judgment of the Court of Appeals was entered on November 22, 1976. The petition for a writ of certiorari in No. 76-1121 was filed on February 14, 1977. The petitions in Nos. 76-1153 and 76-1162 were filed on February 22, 1977. The petitions were granted on April 25, 1977.[2] The jurisdiction of this Court rests on 28 USC Section 1254(1).

III.
STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stats. 136, 73 Stats. 519, 29 USC Section 151, *et seq.*), are as follows:

Section 2. When used in this Act * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees

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[1]References to the Appendix to the Petition for Writ of Certiorari on behalf of the Association of Motion Picture & Television Producers, Inc., will be referred to as "Association Pet. App." References to the printed appendix containing those portions of the record below which have been designated by the parties will be referred to as "App.".

[2]By order of the Court the time for the filing of opening briefs was extended to and including July 25, 1977.

of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of an unfair labor practice . . . but shall not include . . . any individual employed as a supervisor. . . .

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .

Section 10 * * *

(e) The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

IV.
QUESTION PRESENTED.

Whether a labor organization violates Section 8(b)(1)(B) of the National Labor Relations Act when it threatens to discipline and disciplines supervisory members, who are management representatives, and who cross a picket line during a strike and perform only their normal supervisory and management representative functions.

V.
STATEMENT OF THE CASE.

A. STATEMENT OF FACTS.

Commencing in March, 1973, Respondent Writers Guild of America West, Inc. (hereinafter "Union") struck the employer members of Petitioner Association of Motion Picture and Television Producers, Inc.[3] (hereinafter "Association") (Association Pet. App. A, p. 18).

At the time of the strike, a number of the Union's members were employed by these employers as executive producers, producers, associate producers, directors, story editors, research directors and in other executive capacities.[4] (Association Pet. App. A, p. 19). It is

[3]The Union also struck the American Broadcasting Companies, Inc., the Columbia Broadcasting System, Inc., the National Broadcasting Company, Inc., and QM Productions. While the acts that were found by the Board to be violative of Section 8(b)(1)(B) as to these employers parallel those directed by the Union against the employer members of the Association, this brief is filed only on behalf of the Association.

[4]In the motion picture and televison industry, it is not unusual to find an individual who is competent to perform more than one function. Thus an actor may also be a director

clear from the record that these members were, at all times relevant, supervisors within the meaning of Section 2(11) of the Act.[5] (Association Pet. App. A, pp. 8; 22-27). It is equally clear that these members were also management representatives within the meaning of Section 8(b)(1)(B) of the Act.[6] (Association Pet. App. A, pp. 8; 22-27).

The Union endeavored to prevent its supervisory and executive members from performing any services whatsoever for the struck employers. (Association Pet. App. A, pp. 8; 32-34; 39-40). Toward this end, the Union reactivated all of its members who had gone on withdrawn status within the prior two years. (App. pp. 160, 567). The Union also adopted and implemented a policy whereby it would not permit any member to resign until at least six months after the conclusion of collective bargaining, which policy was widely publicized. (App. pp. 149-150). Finally, the Union adopted thirty-one Rules for Conduct of Members during a Strike, which rules forbade members from working for the struck employers "regardless

or a writer, or a producer may also be an actor or a writer. Such multi-talented individuals are known as "hyphenates". It is with the hyphenate members of the Union employed in supervisory and management representative capacities by the employer members of the Association—those executives, executive producers, producers, associate producers, directors, research directors and story editors, who are also writers and Union members—that this case is concerned. (Association Pet. App. A, p. 19).

[5]App. pp. 30; 32-34; 39; 44; 46-49; 51-54; 63-64; 72-73; 77; 89; 91; 100; 105; 107-109; 120-124; 130-131; 134-135; 146; 152; 155; 164; 169.

[6]App. pp. 31-32; 40-42; 45-46; 54; 62-64; 73-74; 77-79; 93-94; 100-105; 107-109; 124-128; 132; 135-136; 145-146; 152-153; 155-156; 159-160.

of the capacity in which they [were] working . . .'". (Association Pet. App. A, pp. 8; 32-34; App. p. 19, ¶24). By means of personal contact, meetings, mailings and publicity the Union threatened and emphasized that these rules would be enforced against supervisory and executive members, even if they performed no rank and file struck work whatsoever.[8] (Association Pet. App. A, pp. 8; 34-36).

At the outset of the strike, the employer members of the Association directed their supervisory and executive employees to continue to perform their supervisory and management representative functions, not-

[7]The strike rules as adopted provided, in part, that:

"12. All members are prohibited from crossing a picket line which is established by the Guild at any entrance to the premises of a struck producer.

• • •

14. Members may not accept from a struck producer for reading, perusal, study or any other purpose any sample script, format, presentation or literary material of any nature which might have any actual or potential connection with future employment of said members as writers *or otherwise* even though such services are to begin after the conclusion of the strike.

• • •

19. A member may not, during the course of a strike, conduct negotiations with a struck producer for financing the production of any of his literary material or scripts or for his participation in such production *in any capacity*.

• • •

24. *All members, regardless of the capacity in which they are working,* are bound by all strike rules and regulations in the same manner and to the same extent as members who confine their efforts solely to writing.

• • •

30. *No member shall work with any individual, including a writer-executive who has been suspended from Guild membership by reason of his violation of strike rules, or who has been found by the Council to have violated strike rules,* in the event no disciplinary action was *instituted against such person*". (Emphasis added). (App. pp. 15-20).

[8]App. pp. 88; 136-138; 150-151; 156-158; 191-194; 199-201; 219-221; 293-298.

withstanding any Union picket line or any other attempt by the Union to prevent them from performing such functions. (Association Pet. App. A, pp. 37-38; App. pp. 473-530; 575-576).

A number of the supervisory and executive members of the Union refused to work during the strike. However, despite the Union's threats and intimidation, others crossed the picket lines to perform their normal supervisorial and management representative functions related to numerous bargaining units which were neither represented by the Union nor on strike.

As a result, commencing on April 6, 1973, and continuing throughout the strike the Union issued Notices of Disciplinary Hearings and charges against various supervisory and executive members, charging them with violating certain strike rules and ordering them to appear before a Union Disciplinary Board.[9] (Association Pet. App. A, pp. 8; 21; 40). None of these Notices contained any allegations that the charged members had engaged in any rank and file struck work during the strike.

Pursuant to these Notices, the Union held intra-union disciplinary hearings. At these hearings, the Union took the position that whether or not the supervisory and executive members had performed rank and file struck work was immaterial. (App. pp. 160-161). No proof of the performance of rank and file struck work by any of the charged members was elicited at their disciplinary hearings. (Association Pet. App. A, pp. 8; 39-40). Indeed, all of the evidence and testimony herein was to the effect that the supervisory and executive members of the Union were neither asked

[9]App. pp. 299-307; 311-313; 398-440; 450-452; 456-458.

to write, nor in fact performed any rank and file struck work during the strike.[10] Nonetheless, the Union meted out discipline against ten such members ranging from a $100 fine to expulsion and a fine of $100,000. (Association Pet. App. A, pp. 8; 41-42; App. pp. 441-449; 453-455).

B. STATEMENT OF PROCEEDINGS BELOW.

In its Decision and Order, the Board, Member Fanning dissenting, adopted and affirmed the findings of the Administrative Law Judge that executive producers, producers, associate producers, directors and story editors employed by the employer members of the Association were supervisors and management representatives within the meaning of the National Labor Relations Act. (Association Pet. App. A, pp. 7; 22-27). Expanding upon the findings of the Administrative Law Judge, the Board found that executives and research directors so employed were also supervisors and management representatives. (Association Pet. App. A, pp. 7-8). The Board adopted and affirmed the findings of the Administrative Law Judge that during the course of the strike these supervisory and executive members of the Union performed no rank and file struck work, but rather performed only their normal supervisory and management representative functions. (Association Pet. App. A, pp. 7; 28-32; 55-56). Finally, the Board affirmed the Administrative Law Judge's conclusion that by its threats to discipline and discipline of supervisory and executive members the Union violated Section 8(b)(1)(B) of the National Labor Relations Act, and sustained the complaints' alleged violations of that section, *in toto*. (Association Pet. App. A, p. 9).

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[10]App. pp. 74; 76; 99; 139-140; 160-161.

The Court of Appeals for the Second Circuit, Judge Moore dissenting, relied primarily upon the reasons set forth in Member Fanning's dissent and denied enforcement of the Board's Order on the basis "that the Board as a matter of law incorrectly applied Section 8(b)(1)(B) to the instant case . . .". (Association Pet. App. A, pp. 2-3).

VI.

SUMMARY OF ARGUMENT.

Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances". This Court, in *Florida Power & Light Co. v. International Brotherhood of Electrical Workers Local 641*, 417 U.S. 790 (1974), held that this statutory provision was not violated by a union that disciplined its supervisory members for performing rank and file struck work.

In the case now before the Court, the Board, affirming the decision of the Administrative Law Judge, held that the Union did violate Section 8(b)(1)(B) by threatening to discipline and disciplining supervisory and executive members who, during a strike, performed only their normal supervisory and management representative functions and performed no rank and file struck work. The Court of Appeals for the Second Circuit denied enforcement of the Board's Order "as a matter of law". In so doing, the Court relied solely on the interpretation placed on *Florida Power* by Board Member Fanning in his dissenting opinion.

Member Fanning construed *Florida Power* to hold that union discipline of supervisory members who work during a strike is totally unregulated by Section 8(b)(1)(B).

Florida Power does not, however, support the construction placed on it by Member Fanning and the Court below. It was tried, briefed, argued and considered by the Board, the Court of Appeals and this Court as raising the very limited issue of whether a union may impose discipline on supervisory members who perform rank and file work during a strike without violating Section 8(b)(1)(B).

Since *Florida Power*, the Board has properly read this Court's holding to immunize union discipline of supervisory members from the reach of Section 8(b)(1)(B) only if it is threatened or administered for the performance of rank and file struck work. The Board's interpretation of *Florida Power* has been affirmed by the Courts of Appeal for the District of Columbia and Seventh Circuits.

As found by the Administrative Law Judge in the present case, a finding adopted and affirmed by the Board, the Union by threatening to discipline and disciplining executives, executive producers, producers, associate producers, directors, research directors and story editors, who during the strike performed only their normal supervisory and management representative functions, violated the plain meaning of Section 8(b)(1)(B).

It was the announced purpose of the Union, in adopting its strike rules prohibiting any kind of work, threatening to discipline, and disciplining supervisory and executive members, to shut down the entire motion

picture and television industry during the strike. The Union sought to achieve this result by depriving employer members of the Association of supervisory and executive personnel who during the strike performed only their normal supervisory and management representative functions related to numerous bargaining units which were neither represented by the Union nor on strike.

Compliance by the supervisory and executive members with the Union's strike rules would have required them to quit their jobs as executives, executive producers, producers, associate producers, directors, research directors and story editors thereby restraining and coercing their struck employers in the selection of these members as representatives for the purposes of collective bargaining or the adjustment of grievances in direct violation of Section 8(b)(1)(B). *New Mexico District Council of Carpenters (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), enf'd. 454 F.2d 1116 (CA 10, 1972).

As a direct, intended and foreseeable result of the Union's threats of discipline and discipline, a number of its supervisory and executive members actually refused to work during the strike. In such circumstances it was reasonable for the Board to conclude that the Union's actions would also have a similar future effect upon them in their roles as grievance adjusters and collective bargaining negotiators, which also constitutes a violation of Section 8(b)(1)(B). *Chicago Typographical Union No. 16 and Hammond Publishers, Inc.*, 216 NLRB 903 (1975).

The Board's findings that the threatened and disciplined supervisors and executives were management representatives within the meaning of Section 8(b)(1)

(B) and were not disciplined for the performance of rank and file struck work, are fully supported by the evidence on the record considered as a whole as applied to relevant Board and judicial precedent.

VII.
ARGUMENT.

A. THE UNION VIOLATED SECTION 8(b)(1)(B) BY THREATENING, FINING AND OTHERWISE DISCIPLINING SUPERVISORY AND EXECUTIVE MEMBERS OF THE UNION WHO CROSSED PICKET LINES TO PERFORM THEIR NORMAL SUPERVISORY AND MANAGEMENT REPRESENTATIVE FUNCTIONS.

1. The Court Below Incorrectly Construed this Court's Decision in Florida Power as Permitting a Union to Discipline Supervisory Members, Who Are Management Representatives, and Who Cross the Union's Picket Line but Perform No Rank and File Struck Work.

The Court of Appeals for the Second Circuit, relying on this Court's decision in *Florida Power, supra,* denied enforcement of the Board's Order "for substantially the reasons set forth in the dissenting opinion of Board Member John H. Fanning. . .". (Association Pet. App. A, p. 3). Member Fanning's dissent, in turn, is based upon his lengthy dissenting opinion in *New York Typographical Union No. 6 International Typographical Union AFL-CIO and Daily Racing Form, a subsidiary of Triangle Publications, Inc.,* 216 NLRB 896 (1975).[11] (Association Pet. App. A, p. 10).

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[11]Reconsidering *New York Typographical Union No. 6 International Typographical Union AFL-CIO and Daily Racing Form, a subsidiary of Triangle Publications, Inc.,* 206 NLRB 294 (1973).

There, Member Fanning concluded that a Union may discipline supervisory and management representative members who work during a strike, irrespective of the nature of the services they perform:

> "*I believe union discipline of all members for conduct related to and during a strike remains unregulated by Congress.* . .". (Emphasis added). *Id.* at p. 902.

Member Fanning, purportedly relying on *Florida Power,* reasoned that whether or not the discipline of supervisory and management representative members of a union violates Section 8(b)(1)(B) depends on the Union's motive in imposing discipline. He distinguished between discipline imposed because of the manner in which a supervisor or management representative performs a collective bargaining or grievance adjustment function, which he considered properly proscribed, and discipline for working during a strike:

> ". . . in a strike situation, what the supervisor does behind the picket line is, in the ordinary case, and most assuredly in this one, completely irrelevant. The union's interest is quite simply to preserve strike solidarity. It is specious to think that the union cares an iota whether its member . . . is adjusting a grievance, operating a press, or engaged in any other activity while his fellow members man a picket line. It cares only that he is working during a strike". *Id.* at p. 899.

It is submitted that Member Fanning's analysis and conclusions find no support in this Court's *Florida Power* decision.

a. Florida Power Was Tried, Briefed, Argued and Considered by the Board, the Court of Appeals and this Court as Raising the Limited Issue of whether, during a Strike a Union May Impose Discipline on Supervisory Members Who Perform Rank and File Struck Work without Violating Section 8(b)(1)(B).

In *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company) and Bell Supervisors Protective Association (Not a Labor Organization)*, 192 NLRB 85 (1971), the Union advised its supervisory members "that it would be the policy of the Union to discipline any foremen who performed rank-and-file work during the strike". *Id.* at p. 85. The Board, affirming the Administrative Law Judge, held that the Union "by imposing on foremen [footnote omitted] possessing the power to adjust grievances fines for crossing the Respondent Local's picket line and performing struck work, violated Section 8(b)(1)(B) of the Act".[12] *Id.* at p. 86. Similarly, in *International Brotherhood of Electrical Workers System Council U-4 et al. and Florida Power & Light Company*, 193 NLRB 30,

[12]See also Member Fanning's dissent, wherein he stated: "*Here the supervisors* were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities . . . . They *were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them,* not in the direction of the employees who had not gone on strike or of replacements for strikers, but *to replace the strikers themselves.* In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act". (Emphasis added). *Id.* at p. 88.

31 (1971), the Board held "that the Respondent Local Unions severally violated Section 8(b)(1)(B) of the Act by trying, fining and/or expelling or suspending from union membership *for performing struck work,* certain supervisors. . .". (Emphasis added).

In its *en banc* decision in *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board*, 487 F.2d 1143 (1973), the Court of Appeals for the District of Columbia posed the issue presented by both *Illinois Bell* and *Florida Power* as follows:

> "Does a union commit an unfair labor practice under Section 8(b)(1)(B), 29 USC §158(b)(1)(B) (1970), by disciplining supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against the Company". *Id.* at p. 1147.

When *Florida Power* came before this Court, Justice Stewart writing for the majority carefully framed the issue in virtually identical terms:

> "*The question to be decided is whether the unions committed unfair labor practices under §8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and performing rank and file struck work* during lawful economic strikes against the companies".[13] (Emphasis added). 417 U.S. at 792.

[13]Significantly, Respondent Unions in their brief on the merits in this Court acknowledged that discipline of supervisors who during a strike cross a picket line to perform only their normal supervisory and management representative functions is proscribed. See Brief for the International Brotherhood of Electrical Workers, AFL-CIO, at pp. 29-30, 37-38.

The Supreme Court majority noted:

> "In *Illinois Bell . . . . Those who* did work during the strike but *performed only their regular [supervisory and managerial] duties were not disciplined* by the union. *In Florida Power . . . the union did not discipline those who did so only to perform their normal supervisory functions*". (Emphasis added). 417 U.S. at p. 812, n. 22.

The holding of the Court in *Florida Power* was as narrow as the issue posed:

> ". . . *we hold that the respondent unions did not violate Section 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank-and-file struck work*".[14] (Emphasis added). *Id.* at p. 813.

The narrowness of the decided issue was confirmed by Justice White, writing for the minority:

> "I do not read the Court to say that §8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, *as opposed to customary rank-and-file work*, during a labor dispute". (Emphasis added). *Id.* at p. 815, n. 2.

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[14]See also 417 U.S. at p. 48, n. 16 where the Court stated: "*To hold that union discipline of supervisor-members for performing rank-and-file struck work is not proscribed* by §8(b)(1)(B) of the Act is not to hold that such discipline is expressly permitted by §8(b)(1)(A) of the Act . . . *The Act*, therefore, *neither protects nor prohibits union discipline of supervisor-members for engaging in rank-and-file struck work*". (Emphasis added).

b. Since Florida Power, the Board Has Consistently and Correctly Construed the Court's Holding to Permit Union Discipline of Supervisory Members only where those Members Perform Rank and File Struck Work.

The Board's interpretation of *Florida Power* is most clearly expressed in its decision in *Triangle Publications, supra,* at p. 897:

> ". . . nothing in the Supreme Court's *Florida Power* decision dictates the conclusion urged by the dissent, that a union has a right to discipline a supervisor-member who performs *any* function during a strike. [Footnote omitted]. The most that can be said is that the Court sanctioned the disciplining of supervisor-members who perform rank-and-file struck work during a strike. In this same vein, it is apparent to us that it was the performance of rank-and-file struck work by supervisor-members which the Supreme Court referred to as strike breaking for which union sanctions could be incurred. [Footnote omitted]". (Emphasis in original).

See also *Local No. 492, United Brotherhood of Carpenters and Joiners of America and Keystone Conservation Services, Inc.,* 211 NLRB 62 (1974); *International Union of Operating Engineers, Local No. 9, AFL-CIO (Shelton Pipeline & Construction, Inc.) and Robert Collins,* 213 NLRB 679 (1974); *Chicago Typographical Union No. 16 and Hammond Publishers, Inc., supra; Writers Guild of America, West, Inc. and Association of Motion Picture and Television Producers, Inc.,* Association Pet. App. A, pp. 6-71; *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-*

CIO and Skippy Enterprises, Inc., 218 NLRB 1063 (1975); *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union and Associated Food Stores, Inc.*, 220 NLRB 809 (1975); *Meat and Provision Drivers Union Local 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al. and Food Employers Council*, 224 NLRB No. 40 (1976).

The Board's construction of *Florida Power* has been adopted by the Court of Appeals for the Seventh Circuit in *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. National Labor Relations Board*, 532 F.2d 47 (CA 7, 1976) and by the Court of Appeals for the District of Columbia in *Hammond Publishers, Chicago Typographical Union No. 16 v. National Labor Relations Board*, ... F.2d ..... (Association Pet. App. B, p. 74). While the court rendered no opinion in *Hammond*, its view of the matter is clearly expressed in its *en banc* decision in *Florida Power*:

> "When a supervisor acts as such he is a representative of management, and as such he should be immune from union discipline. *The unions participating in the present cases conceded* as much at oral argument when they agreed *that when a supervisor crosses a picket line to perform supervisory work he remains immune from discipline*". (Emphasis added). 487 F.2d at p. 1157.

In sum, the limited teaching of *Florida Power* is that a union may with impunity discipline supervisory members for the performance of rank and file struck work. However, the Court below, by adopting Member Fanning's reasoning, would read the language of *Florida Power* in a much broader fashion. Focusing

on the Court's discussion of the interplay between Sections 2(3), 8(b)(1)(B) and 14(a) of the Act, Member Fanning concluded that the loyalty an employer may demand from a supervisor during a strike is controlled by Sections 2(3) and 14(a) and therefore not protected by Section 8(b)(1)(B). *Triangle Publications, supra*, at p. 900. Accordingly, Member Fanning reasoned that *all* strike related discipline of supervisors is outside of the purview of Section 8(b)(1)(B).

This broad reading of Section 8(b)(1)(B) was rejected by the Court of Appeals for the District of Columbia in its *en banc* decision in *Florida Power:*

> "This is not to say, of course, that by permitting his supervisors to join unions the employer completely waives his right to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters*, immunizes them from union discipline imposed for the manner in which they perform their supervisory functions". 487 F.2d at p. 1170.

In affirming the Court of Appeals' *en banc* decision, the Supreme Court voiced no disagreement with this analysis. In fact, it is not unreasonable to assume that the Court approved it. Otherwise, there would have been little point in the Court's repeated emphasis of the fact that the disciplined supervisory members of the union acted as strike breakers and performed rank and file struck work. 417 U.S. at pp. 793-794, 796-797, 802, 805-806, 813.

In *Florida Power*, the unions successfully argued that such strike breaking activity should constitute a limitation to the protection afforded employers by Section 8(b)(1)(B) against union discipline of manage-

ment representatives. Member Fanning himself recognized in *Illinois Bell, supra* at p. 88, n. 12 that:

> "if the Employer had requested his supervisors to perform their normal supervisory functions in the direction of replacements or other workers during the strike, we would have a different situation".

The Court of Appeals for the Second Circuit, however, would construe Section 8(b)(1)(B) as totally inapplicable during a strike—thereby making the exception, carved out in *Florida Power*, the rule.

2. The Union's Discipline of Supervisory and Executive Members Who Worked during the Strike Is Violative of the Plain Meaning of Section 8(b)(1)(B).

In *Triangle Publications*, 216 NLRB at p. 898, Member Fanning stated that the Board, in a line of cases beginning with *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968), has improperly:

> "expanded the reach of Section 8(b)(1)(B). [Footnote omitted]. Union discipline of supervisor members became proscribed not merely when the nature of the dispute between union and supervisor involved the latter's performance of particular collective-bargaining or grievance adjustment functions but in all settings in which the supervisor has engaged in *any* supervisory or management function".[18] (Emphasis in original).

[18]It should be noted that Member Fanning participated in the unanimous decision in *Oakland Mailers*.

This Court did not expressly deal with this line of cases in *Florida Power*. As to *Oakland Mailers*, the Court majority assumed without deciding that it fell "within the outer limits" for the application of Section 8(b)(1)(B) under the test established by the Court. 417 U.S. at p. 805.

It is equally unnecessary in this case to decide whether *Oakland Mailers* comes within the purview of this section. As found by the Administrative Law Judge—a finding adopted and affirmed by the Board—the Union's activities in the case now before the Court clearly and directly violated the plain meaning of Section 8(b)(1)(B):

> *"It is clear that Respondent's action in this case violated the plain meaning of the statute without the necessity of resort to statutory exegesis.* To illustrate: A person performing the function of a director acts in a managerial or supervisory capacity, which normally includes the adjustment of grievances of actors, actresses, craft employees and others. One occupying the position of a producer normally has a similar capacity and similar duties with respect to employee grievances. In addition, if the film is being shot on distant location the producer has authority to negotiate on the spot agreements with local unions. Thus *when Respondent prevented or sought to prevent, such hyphenate members from going to work in their managerial and supervisory capacities as producers and directors during the strike, Respondent obviously coerced and restrained their employers in the selection of those specific producers and directors 'for the purpose of collective bargaining*

and the adjustment of grievances of employees working during the strike within the plain meaning of the statute. Similarly, those persons employed as story editors or in like classifications perform executive functions normally, and appear to have done so during the strike . . . Respondent, *by coercing or restraining persons in these classifications from going in to do their normal work thereby actually coerced and restrained their employers from selecting those persons* as the employers' representatives for the adjustment of grievances and for collective bargaining during the strike". (Emphasis added). (Association Pet. App. A, pp. 7; 58).

It is clear that the instant case is controlled by the Board's decision in *New Mexico District Council of Carpenters (A.S. Horner, Inc.), supra.*

The Court of Appeals for the District of Columbia in its *en banc* decision in *Florida Power* recognized *Horner* as falling "close to the original rationale of §8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing". 487 F.2d at p. 1155, n. 19. The Court recognized the clear factual distinction between *Florida Power*, where there was no present effect on the employer, *Id.* at p. 1153, and cases such as *Horner*.

In *Horner*, the union fined a supervisory member because he refused to accede to the union's demand that he cease working for a company which did not have a contract with the union. The union had "pulled off" its members from the job, thereby in effect striking the company. 177 NLRB at p. 502, n. 7. The Board concluded that the union's disciplinary action violated

Section 8(b)(1)(B) because compliance by the supervisor with the union's demand would have required him to quit his job with the company and hence would have the effect of immediately depriving the company of the services of its selected collective bargaining or grievance adjustment representative. *Id.* at p. 502.

Applying the *Horner* rationale to the case at bar, it is clear that the Union's actions directly violated Section 8(b)(1)(B). It was the avowed purpose of the Union to shut down the entire motion picture and television industry by depriving employer members of the Association of key supervisory and executive personnel—personnel who during the course of the strike were required to perform and performed only their normal supervisory and management representative functions related to numerous bargaining units which were neither represented by the Union nor on strike. The Union sought to achieve this end by reactivating members who had gone on withdrawn status, and by prohibiting members from resigning their Union membership. The Union also adopted numerous strike rules, including a black list rule, forbidding members from working for the struck employers in *any capacity* whatsoever.

Compliance by the Union's supervisory and executive members with these strike rules would have required them to quit their jobs as executives, executive producers, producers, associate producers, directors, research directors and story editors (General Counsel's Exhibit 16 L, Ex. 5) thereby immediately depriving their struck employers of their services as representatives for the purposes of collective bargaining and the adjust-

ment of grievances. Indeed, as a direct and foreseeable result of the Union's actions a number of the supervisory and executive members refused to work during the strike, thereby *actually* depriving their employers of their management representative services.

While neither the Administrative Law Judge nor the Board cited *Horner* in the case now before the Court, the Board has relied on *Horner* in other cases where supervisors were disciplined for performing their normal supervisory and management representative functions during a strike. ***Warehouse Union Local 6, supra; Wisconsin River Valley District Council of Carpenters, supra.***

In his dissent in *Triangle Publications, supra* at p. 900 Member Fanning stated:

> "My reading of *Florida Power* compels the further conclusion that the operative test in establishing a violation of Section 8(b)(1)(B) is whether it is reasonable to conclude that the union's discipline may adversely affect the disciplined supervisors' *future* performance of two distinct functions, grievance adjustment and collective-bargaining representation". (Emphasis added).

Member Fanning and, therefore, the Court below, apparently totally overlooked the all-important fact that in the case now before this Court, unlike in *Florida Power*, the Union's threats and acts were intended to have and did in fact have the *present* effect of depriving the employers of the right to select their representatives for collective bargaining or the adjustment of grievances. As to those supervisors and executives who refused to cross the Union's picket line, any speculation as to future effect thereby becomes wholly unnecessary.

3. The Court below Should Have Accepted the Board's Application of the "Effect Test" to the Union's Conduct because It Is Consistent with the Standard Established by this Court in Florida Power.

In *Florida Power*, this Court decided that the applicability of Section 8(b)(1)(B) depends on the *effect* of a union's discipline upon a supervisor's conduct as a management representative:

> ". . . a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer". 417 U.S. at pp. 804-805.

Based upon this construction, the Board has developed its "effect test", first enunciated in *Hammond Publishers, supra.* (Association Pet. App. A, p. 9, n. 6). There the Board decided that under *Florida Power* the applicability of Section 8(b)(1)(B) turns:

> ". . . on a determination . . . of the reasonable effect of that discipline on the supervisor's activities as an 8(b)(1)(B) representative". 216 NLRB at p. 903.

The Board reasoned that:

> "The further question of 'when that discipline may adversely affect the supervisor's conduct . . .' clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed . . .". *Id.* at p. 904.

See also *Triangle Publications, supra; Bakery and Confectionary Workers International Union of America, Local Unions 24 and 119 and Food Employers Council, Inc.*, 216 NLRB 917 (1975).

Discussing the application of the effect test, the Board in *Hammond Publishers* noted:

> "The application of the effect test [of Florida Power] is relatively straightforward in extreme situations *where the disciplined supervisor has engaged* either *only in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining)*, or *only* in the performance of rank-and-file struck work [Footnote omitted]. In the former *there is clearly a violation since it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties where he is disciplined after having engaged only in the performance of supervisory duties*". *Id.* at p. 904.

Where, as in the case at bar, the Union's threats and discipline had as their intended, actual and immediate effect the refusal by a number of supervisory and executive members to work during the strike and to perform their normal supervisory and management representative functions, it was clearly reasonable for the Board to conclude that these actions would also have a similar future effect.

The Board's determination as to the effect of the Union's discipline upon these supervisory and executive members, based as it is upon the Board's specialized expertise, is not "to be disturbed by a reviewing court merely because in its own opinion it disagrees with the rightness of the Board's judgment". *Radio Officers*

Union v. National Labor Relations Board, 347 U.S. 17, 48-49, 51. This is true *a fortiori* in the instant case, where any conclusion contrary to the Board's, as to future effect, would be manifestly unreasonable.

B. THE FACTUAL ISSUES RAISED BY THE UNION IN ITS OPPOSITION TO THE PETITIONS FOR CERTIORARI AND IN THE COURT BELOW WERE CORRECTLY DECIDED BY THE BOARD.

The Union urged this Court to deny certiorari, *inter alia*, on the basis that:

> ". . . there will be difficulty in this case in getting to those legal issues the petitioners contend need to be resolved, since there is a dispute *first*, over *whether the hyphenates are §8(b)(1)(B)-type supervisors*, and *second*, as to *whether they performed rank-and-file work during the strike* and thus were clearly subject to discipline under the rule of *Florida Power* . . .". (Emphasis added). (Brief In Opposition To Petitions For Certiorari at p. 3).

While the Union also raised these issues in the Court of Appeals for the Second Circuit, that Court did not reach them because it decided the case "as a matter of law". (Association Pet. App. A, p. 3).

Both issues were fully considered by the Administrative Law Judge and the Board and determined adversely to the Union. (Association Pet. App. A, pp. 7-8; 22-32). The Board's findings and conclusions as to these issues are fully supported by substantial evidence on the record considered as a whole and are therefore conclusive. 29 USC Section 160(e); *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

1. The Board Correctly Found that the Supervisory and Executive Members of the Union Employed by the Employer Members of the Association Are Management Representatives within the Meaning of Section 8(b)(1)(B) of the Act.

There is overwhelming record evidence that all of the executives, executive producers, producers, associate producers, directors, research directors and story editors who were subject to the Union's threats of discipline and discipline are supervisors and adjust the grievances of employees or have the authority to do so,[18] and that a number of the affected executives and producers even negotiate collective bargaining agreements on behalf of their employers. See Section V (A), above. Therefore the Board's finding that the supervisory and executive members of the Union are Section 8(b)(1)(B) management representatives was not subject to being disturbed on review by the court below.

In fact, the Union conceded below that persons in the categories of executive, executive producer, producer, associate producer, director and research director do adjust, or have the authority to adjust, grievances of employees other than writers. (Union Brief In Support Of Exceptions To The Decision Of The Administrative Law Judge, p. 3).

[18]The Union contended below that such grievances as are adjusted by story editors are subject to appeal to higher level management or to the Union and are thus insufficient to constitute story editors Section 8(b)(1)(B) management representatives. A similar contention was considered and rejected by the Board in *Oakland Mailers', supra:*

> ". . . the fact is that the Charging Party has designated the foreman and, in his absence, the assistant foreman, as its *representative to make initial decisions in the adjustment of grievances* or the settlement of disputes arising under the contract, and, I find therefore, that Cox, Thompson, Fraser and Bowlin are *representatives of the Charging Party within the meaning of Section 8(b)(1)(B) of the Act*". (Emphasis added). 172 NLRB at p. 2176.

Moreover, the Union's contention is also inconsistent with its concession, *infra,* that supervisory members, other than story editors, adjust employee grievances, although such adjustment is also subject to appeal to higher level management, i.e. studio executives, or even to a neutral arbitrator.

Nevertheless, the Union contends that these supervisors and executives are not Section 8(b)(1)(B) management representatives because:

> ". . . there was no evidence that any disciplined hyphenate—either before, during or after the strike —performed collective bargaining functions vis-a-vis the disciplining union or its members". *Id.* at p. 2.

This contention is contrary to the plain language of Section 8(b)(1)(B) and has been repeatedly rejected by the courts and by the Board. *International Organization Of Masters, Mates And Pilots v. National Labor Relations Board,* 486 F.2d 1271, 1274 (CADC, 1973); *Wisconsin River Valley Council of the United Brotherhood of Carpenters, supra* at p. 1064; *Triangle Publications, supra* at p. 896 n. 3.

2. The Board Correctly Found that the Supervisory and Executive Members of the Union Employed by the Employer Members of the Association Performed No Rank and File Struck Work.

There is no evidence whatsoever in the record that the Union's supervisory and executive members performed any rank and file struck work during the course of the strike. Rather all of the record evidence is to the effect that these supervisory and executive members were neither asked to write, nor in fact performed any rank and file struck work. See Section V (A), above.

While some of the supervisors and management representatives may have performed certain of the so-called "(a) through (h)" functions[17] during the strike, the plain language of the Agreement makes clear that such work was not reserved to bargaining unit employees and was therefore not rank and file work. It most assuredly was not struck work.

The Agreement carefully delineates those particular writing functions which the parties did intend to reserve to bargaining unit employees: writing or preparing literary material or making revisions, modifications, or changes in literary material. (App. pp. 236-239; General Counsel's Exhibit 2, Art. 1.C.1.a.(1), (2) and (3)). The Agreement, with equal care, delineates those *writing functions which are not so reserved, specifically including among others the "(a) through (h)" functions.*

Moreover, Article 14 A of the Agreement specifically provides that the services of an individual "other than

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[17]The 1970 Theatrical and Television Film Basic Agreement between the parties excluded from its coverage the following writing services when performed by a producer, director, story editor or any other non-bargaining unit employee:

"(a) Cutting for time
(b) Bridging material necessitated by cutting for time
(c) Changes in technical or stage directions
(d) Assignment of lines to other existing characters occasioned by cast changes
(e) Changes necessary to obtain continuity or legal clearance
(f) Casual minor adjustments in dialogue or variation made prior to or during the period of principal photography
(g) Such changes in the course of production as are made necessary by unforeseen contingencies (e.g., the elements, accidents to performers, etc.)
(h) Instructions, directions, or suggestions, whether oral or written made to writer regarding story or teleplay" (App. pp. 236-237; General Counsel's Exhibit 2, Art. 1.C.1.a.(3)(a) through (h)).

as a writer . . . shall not be subject to this Basic Agreement". (App. pp. 250-251). And Articles 1.B.1.a.(2) and 1.C.1.a.(3) provide that the performance of the "(a) through (h)" functions by a producer, director, story editor or any other non-bargaining unit employee "shall not be subject to this Basic Agreement and such services shall not constitute such person a writer hereunder . . .".

The Union's factually unfounded contention that the "(a) through (h)" functions constitute rank and file work is nothing more than a belated effort to bring this case within the Court's holding in *Florida Power*. For, while a number of the Union's strike rules specifically forbade writing for struck employers, none of the supervisory or executive members were charged with having violated such rules. The Union did not try to elicit testimony during the disciplinary hearings held for the purpose of trying "offending" members that such members in fact performed any rank and file struck work. Indeed, by its own admission, the Union was unconcerned with the nature of the services performed by the supervisory and executive members during the strike, but regarded the crossing of the picket line for *any* purpose as grounds for the imposition of discipline. (App. pp. 160-161).

VIII.
CONCLUSION.

The Board's findings and conclusions are based upon the facts found in the record, taken as a whole; properly apply relevant Board and judicial precedent; and have "a reasonable basis in the law". Therefore, the Board's Order is entitled to enforcement by the Second Circuit.

National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). Accordingly, the judgment of the Court of Appeals for the Second Circuit should be reversed and this case should be remanded to that Court with directions to enforce the Order of the National Labor Relations Board.

Respectfully submitted,

HARRY J. KEATON,
Attorney for Petitioner, Association of Motion Picture and Television Producers, Inc.

Of Counsel:
MITCHELL, SILBERBERG & KNUPP,
ANDREW B. KAPLAN,

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